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Supreme Court, U.S.
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No. 95-1609

In The

Supreme Court of the United States

October Term, 1995

MENTOR CORPORATION,

Petitioner and Cross-Respondent,

vs.

ALFRED BINGHAM,

Respondent and Cross-Petitioner.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR CROSS-RESPONDENT IN RESPECT OF THE CROSS-PETITION

MICHAEL CONNELLY
EARNEST W. WOTRING
MAYOR, DAY, CALDWELL & KEETON, L.L.P.
700 Louisiana, Suite 1900
Houston, Texas 77002
Telephone: (713) 225-7000
Facsimile: (713) 225-7047

GEORGE A. CUMMING, JR.
Counsel of Record
THOMAS M. PETERSON
BROBECK, PHLEGER & HARRISON, LLP
One Market, Spear Tower
San Francisco, California 94105
Telephone: (415) 442-0900
Facsimile: (415) 442-1010

Attorneys for Petitioner and Cross-Respondent

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OR CALL COLLECT (402) 342-2831

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QUESTION RESTATED

Do the Medical Device Amendments to the Food, Drug and Cosmetics Act, 21 U.S.C. § 360c *et seq.*, preempt state law claims that allege that the plaintiff was injured by a medical device that lacked an adequate warning?

BRIEF FOR CROSS-RESPONDENT IN RESPECT OF THE CROSS-PETITION

On January 19, 1996, this Court granted certiorari in *Lohr v. Medtronic, Inc.*, 56 F.3d 1335 (C.A. 11 1995), *cert. granted*, Nos. 95-754 and 95-886. *Lohr* presents, among other issues, whether state law claims for negligence and strict liability are preempted by federal law when the plaintiff alleges injury caused by a manufacturer's failure to warn about a medical device.

Similarly, the conditional cross-petition in this case asks the Court to decide whether the Medical Device Amendments to the Food, Drug and Cosmetics Act (21 U.S.C. § 360c, *et seq.*) preempt claims asserting liability under state law for a failure to warn about a medical device that allegedly caused injury. In this case, the Fifth Circuit found preempted state law claims based on strict liability, negligence, and the Texas deceptive trade practices act. Each such preempted claim rested on the assertion of a failure to warn about the medical device at issue.

To this extent, there appears to be similarity between some of the issues before the Court in *Lohr* and some of the issues presented by the conditional cross-petition.

We also note, however, that the cross-petition purports to raise for consideration issues that were waived in the court of appeals. Appellant's opening brief in the court of appeals recites the following:

> Mr. Bingham now drops his manufacturing claims, including both the negligent and strict liability theories of manufacturing based liability. In addition, Mr. Bingham drops his warranty claims, including both express and

> implied theories of breach of warranty liability. Mr. Bingham proceeds on appeal with his design defect claims. Mr. Bingham also proceeds with his appeal of warning and DTPA claims. (Appellant's Opening Brief, p. 2.)

In view of this waiver, Mr. Bingham no longer has available claims in warranty or claims under the theory of tortious manufacturing.

Dated: May 3, 1996

Respectfully submitted,

GEORGE A. CUMMING, JR.
Counsel of Record
THOMAS M. PETERSON
BROBECK, PHLEGER & HARRISON, LLP

MICHAEL CONNELLY
EARNEST W. WOTRING
MAYOR, DAY, CALDWELL & KEETON, L.L.P.

Attorneys for Petitioner and Cross-Respondent